No. 89-1542

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1990

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ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

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*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

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# BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of a Department of Labor regulation if the Secretary's and the Commission's interpretations of the regulation conflict.

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## BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 891 F.2d 1495. The decision of the Occupational Safety and Health Review Commission (Pet. App. 14a-54a) is reported at 12 O.S.H. Cas. (BNA) 2067 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,691. The decision of the administrative law judge (Pet. App. 55a-91a) is unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on December 22, 1989. On March 13, 1990, Justice White extended the time for filing a petition for a writ of certiorari to April 9, 1990. The petition for a writ of certiorari was filed on April 2, 1990, and was granted on June 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651(b)(3), 655, 658, 659, 660 and 661) are set forth in the appendix to the petition (at 92a-110a). Department of Labor regulations 29 C.F.R. 1910.134 and 1910.1029(g) are also set forth in the appendix to the petition (at 111a-123a).

## STATEMENT

1. In 1970, Congress enacted the Occupational Safety and Health Act (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*). The purpose of the legislation was "to assure so far as possible • • • safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. 651(b). The Act reflected a congressional determination that "the existing state statutory remedies as well as state common-law actions for negligence and wrongful death" had proven "inadequate to protect the employee population from death and injury due to unsafe working conditions." *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-445 (1977).



To further its goal of ensuring workplace safety, the OSH Act charges the Secretary of Labor with a broad range of regulatory and enforcement responsibilities. Most fundamentally, the Act "authoriz[es] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. 651(b)(3), 655. Employers must comply with these standards. 29 U.S.C. 654(a)(2).[1] In addition to promulgating standards, the Secretary has the authority to "modify or revoke" standards, and to grant individual variances. 29 U.S.C. 655(b), 655(d). Congress also charged the Secretary with enforcing the Act and empowered her to undertake various enforcement activities—conducting investigations and workplace inspections (29 U.S.C. 657); issuing citations to employers when she determines that an employer has violated the OSH Act or any standard, regulation, or order promulgated by the Secretary (29 U.S.C. 658); proposing civil penalties against cited employers (29 U.S.C. 659(a), 666); prescribing abatement periods for cited health and safety violations (29 U.S.C. 658(a), 659(b)); and seeking injunctive relief in federal court from imminent dangers to employee safety and health (29 U.S.C. 662(a)). See generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 3-4 (1985); *Whirlpool Corp.* v. *Marshall*, 445

[1] An employer also has a duty under the Act to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. 654(a)(1)); an employee, in turn, has a duty to "comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to [the Act] which are applicable to his own actions and conduct." 29 U.S.C. 654(b).

U.S. 1, 8-9 (1980); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 445-446.[2]

At the same time, Congress also created, in the OSH Act, the Occupational Safety and Health Review Commission (the Commission). The role of the Commission is described as "carrying out adjudicatory functions." 29 U.S.C. 651(b)(3). The Commission consists of three members, appointed by the President and confirmed by the Senate, who "by reason of training, education, or experience are qualified to carry out the functions of the Commission." 29 U.S.C. 661(a). The Act also provides the Chairman of the Commission with authority to hire administrative law judges to assist the Commission in performing its functions. 29 U.S.C. 661(e).

The Commission's sole responsibility is to adjudicate challenges to the Secretary's citations. The only rulemaking authority conferred upon the Commission by the OSH Act is "to make such rules as are necessary for the orderly transaction of its proceedings." 29 U.S.C. 661(g). The Commission has no jurisdiction over petitions to review the Secretary's promulgation of a safety or health standard; rather, the statute provides the courts of appeals with authority to review challenges to standards. 29 U.S.C. 655(f). The Commission also has no non-adjudicatory enforcement responsibilities.

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[2] The Secretary has delegated many of her OSH Act responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA), an agency within the Department of Labor that is responsible for enforcing the OSH Act. See generally Secretary of Labor's Order No. 12-71, 36 Fed. Reg. 8754 (1971); Order No. 8-76, 41 Fed. Reg. 25,059 (1976); Order No. 9-83, 48 Fed. Reg. 35,736 (1983).



A Commission proceeding arises from a challenge to a citation or notice of penalty by the Secretary. An employer may contest the Secretary's citation or notice of penalty before the Commission; in addition, an employee or employees' representative may challenge the time allowed for abatement in the Secretary's citation. 29 U.S.C. 659(c).[3] When a citation, penalty, or abatement date is contested, the Commission must "afford an opportunity for a hearing * * * [and] thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c); see also 29 U.S.C. 666(j).[4] The Commission has the power to compel attendance of witnesses, production of documents, and taking of evidence. 29 U.S.C. 661(h) and (i). After the Commission issues its decision, an aggrieved private party, or the Secretary, may seek judicial review of adverse Commission decisions in a specified court of appeals. 29 U.S.C. 660(a) and (b). "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 446.

If the Commission affirms a citation, or if no challenge to a citation is filed, only the Secretary may seek its enforcement in the court of appeals. 29

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[3] If no challenge is filed to the Secretary's citation or notice of penalty, the citation or penalty itself becomes an order of the Commission. 29 U.S.C. 659(a).

[4] An administrative law judge presides at the hearing and issues a decision; further review by the Commission is discretionary. If no Commissioner directs further review within 30 days of the ALJ's decision, that decision becomes a final order of the Commission. 29 U.S.C. 661(j).

U.S.C. 660(b). All civil penalties assessed in final Commission decisions are payable to the Secretary for deposit into the Treasury of the United States, and are recoverable in a civil action brought by the Secretary in federal district court. 29 U.S.C. 663, 666(*l*); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 447.

2. In 1976, the Secretary determined that coke oven emissions are carcinogenic. Pursuant to her rulemaking authority under the Act, the Secretary promulgated a standard governing occupational exposure to coke oven emissions. 41 Fed. Reg. 46,742-46,790 (1976); 29 C.F.R. 1910.1029. See generally *American Iron & Steel Inst.* v. *OSHA*, 577 F.2d 825 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980). The standard requires that in "regulated areas" an employee's exposure to coke oven emissions be limited to a specified level. See 29 C.F.R. 1910.1029(c). The standard also requires the use of engineering and work practice controls to achieve that goal. 29 C.F.R. 1910.1029(f). Of particular relevance to this case, the standard permits the use of respirators as a method of compliance in certain circumstances—for example, when controls are not yet sufficient to reduce exposure to the permissible limit (29 C.F.R. 1910.1029(g)(1)). The coke oven regulation includes requirements concerning provision of respirators in such circumstances (29 C.F.R. 1910.1029(g)), and one of these requirements incorporates into the coke oven regulation a general regulation regarding respirators. See 29 C.F.R. 1910.1029(g)(3) ("The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part").[5]

[5] Section 1910.134 is a general OSHA standard that contains the basic requirements for acceptable respiratory protection programs and for proper selection, use, cleaning, and maintenance of respirators. The standard applies by its own terms when respirators are "necessary to protect the health of the employee." 29 C.F.R. 1910.134(a)(2). In addition, the standard is incorporated by substance- or industry-specific standards. Thus, several other standards, in addition to the coke oven emission standard, incorporate Section 1910.134 in whole or in part. See, *e.g.*, 29 C.F.R. 1910.1017(g)(3) (vinyl chloride), 1910.1043(f)(3) (cotton dust), 1910.1047(g)(3) (ethylene oxide), 1910.1048(g)(3)(i) (formaldehyde).



3. In August 1979, the Secretary conducted an inspection at respondent's coke oven facility in Pueblo, Colorado.[6] The Secretary and respondent had previously reached a settlement regarding citations issued to respondent for violations of the coke oven emissions standard. Pet. App. 19a. As a result of the August 1979 inspection, the Secretary issued three additional citations, one of which is involved in this case; it alleges violations of 29 C.F.R. 1910.1029(g)(3) and the general respiratory protection standard that it incorporates (29 C.F.R. 1910.134). Pet. App. 3a, 36a-37a, 90a-91a.

[6] References in this brief to respondent are to respondent CF&I Steel Corporation, which briefed and argued the case in the court of appeals. The Commission was a nominal respondent in the court of appeals (pursuant to Fed. R. App. P. 15(a)), but did not participate in those proceedings, in accordance with its statutory role as a purely adjudicatory agency. See generally *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652-653 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982); *Marshall* v. *OSHRC*, 635 F.2d 544, 547 (6th Cir. 1980); *Marshall* v. *Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1184 (3d Cir.), cert. denied, 449 U.S. 1061 (1980); *Dale M. Madden Constr., Inc.* v. *Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974); see also *In re Perry*, 882 F.2d 534, 537 n.2 (1st Cir. 1989). But see *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974); *Diamond Roofing Co.*

The inspection disclosed that respondent had conducted two kinds of respirator tests with its employees. Pet. App. 79a. The first was a "positive/negative pressure test," in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal; it is not conducted in a "test atmosphere." *Id.* at 3a, 59a. The second was a "banana oil" test, in which a worker, while wearing a respirator, is put in a "test atmosphere" and exposed to isoamyl acetate ("banana oil") in order to determine whether he can detect the odor of the chemical despite the respirator. *Id.* at 3a, 38a, 59a. The Secretary discovered that, during respondent's administration of the banana oil test, 28 of respondent's employees had detected banana oil, but that respondent had failed to furnish them with different respirators. Instead, respondent had simply sent the employees, with the same respirators, into a "regulated area." *Id.* at 3a, 38a-39a, 78a. Some of these employees were exposed to coke oven emission levels exceeding the permissible exposure limit. *Id.* at 81a-82a. Relying on the fact that "28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit" (*id.* at 37a), the Secretary issued a citation for a "willful" violation[7] of 29 C.F.R.

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v. *OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976). Because this case raises an important question of the statutory allocation of responsibilities between the Secretary and the Commission, the Solicitor General has authorized the Commission to file a brief amicus curiae.

[7] A "willful" violation is in the most serious category of civil violation, and the highest civil penalties are authorized for such violations; only "repeated" violations carry equally



1910.1029(g)(3) and assessed the maximum penalty of $10,000.[8]

4. Respondent contested the citation. A Commission administrative law judge held five days of hearings in February 1980, and in August 1981 issued an opinion upholding the citation. The ALJ found that, as the Secretary charged, 28 employees detected banana oil in the fit test but were then sent into the coke oven areas with the same respirators. Pet. App. 79a-82a.

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severe penalties. 29 U.S.C. 666(a). Violations may also be characterized as "serious" and "not serious" (29 U.S.C. 666(b) and (c)) or as "de minimis" (29 U.S.C. 658(a)).

[8] The allegations of the pertinent citation state:

> 29 C.F.R. 1910.1029(b) [*sic*] (3): The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that; Respirator Training did not provide the men an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.
>
> b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit.

OSHA Citation R5620-018, No. 2 (Aug. 29, 1979). The citation was subsequently amended to identify correctly the coke oven emissions respiratory program standard, which appears at 29 C.F.R. 1910.1029(g)(3), not 1910.1029(b)(3), and to substitute the word "employees" for the word "men" in the first sentence of the citation. ALJ hearing (Feb. 25, 1980), Tr. 12. The ALJ's quotation of the citation in his decision (Pet. App. 76a) correctly incorporates the substitution of the word "employees," but fails to correct the reference to 29 C.F.R. 1910.1029(b)(3).

The Secretary maintained that Section 1910.1029 (g)(3) of the coke oven emissions standard, by incorporation of the respiratory protection program requirement in 29 C.F.R. 1910.134(e)—1910.134(e)(5) in particular[9]—requires employers both to use a test atmosphere (as in the banana oil test) to assure that each employee's respirator fits properly, and to provide a different type or size respirator if an employee's equipment fails the test. Pet. App. 39a, 78a-79a. Respondent defended on the ground that the standard did not require testing in a test atmosphere at all, and that the positive/negative tests fully satisfied the standard. *Id.* at 78a-79a.

The ALJ agreed with the Secretary that the pertinent regulation—29 C.F.R. 1910.134(e)(5)—requires qualitative fit testing in a test atmosphere and imposes a requirement that a respirator fit properly. Pet. App. 79a. "Since these test results show that the employees were not properly fitted, respondent was obligated to provide a different respirator to those that failed the test." *Id.* at 80a. The ALJ also concluded that the violation was willful. In reaching that determination, he noted, first, that "the requirements of the standard were explained to respondent long in advance of the inspection by the [OSHA] compliance officer" (*id.* at 81a), and, second, that respondent's own training film recognized its obligation to provide different respirators to employees who failed the banana oil test. *Ibid.* He observed that respondent's "cynical disregard for the safety of its workers and * * * deliberate disregard for the stand-

[9] 29 C.F.R. 1910.134(e)(5) provides, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere." See Pet. App. 115a.



ard itself make[] even the maximum penalty seem pitifully inadequate." *Id.* at 82a.[10]

5. Five years later, in September 1986, the Commission reversed the ALJ's judgment. In a 2-1 decision the Commission concluded that Section 1910.1029(g)(3)—the coke oven provision incorporating the respirator standard—is a "training standard" and "does not require the employer to assure proper fit of an employee's respirator." Pet. App. 40a. The Commission emphasized that the next paragraph of the coke oven regulation—Section 1910.1029(g)(4)—explicitly requires that respirators fit properly; thus, in the Commission's view, Section 1910.1029(g)(3) could not, without redundancy, be read to require correct respirator fit as well. Pet. App. 40a, 41a-42a. The Commission also concluded that, by its own terms, the general respirator standard of Section 1910.134 does not impose a requirement that an employer assure respirator fit; the Commission stressed that Section 1910.134 refers to instruction and training and should be interpreted as a training program. Pet. App. 40a. Thus, the Commission interpreted Section 1910.134(e)(5) as "requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper

[10] The ALJ upheld the citation only insofar as it alleged that respondent failed to provide properly fitted respirators to employees who failed the banana oil test, and did not affirm that portion of the citation challenging respondent's failure to test certain employees. See paragraph (b) of citation, *reprinted in* note 8, *supra*; Pet. App. 77a-78a. Although the Secretary disagrees with the ALJ's interpretation on this point, and believes that testing in a test atmosphere must be done before an employee's assignment to a regulated area, the Secretary has not challenged the ruling in this proceeding.

fit and how to obtain a face-piece seal" (Pet. App. 41a), and as requiring the employer to give an employee the opportunity to wear the respirator in a test atmosphere during training. *Ibid.* The Commission concluded, however, that it does not require the employer to insure that proper fit is achieved. *Ibid.*[11]

Since respondent's employees had received instruction and an opportunity to wear respirators in a test atmosphere, the Commission concluded that the requirements of Section 1910.134 had been met. Pet. App. 45a. According to the Commission, "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Ibid.* Accordingly, the Commission vacated the citation, with one Commissioner dissenting.[12]

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[11] The Commission also supported its interpretation by reasoning that the national consensus standard for respiratory protection developed by the American National Standards Institute, which served as the source for 1910.134(e), merely advised, but did not require, respirator fit testing in a test atmosphere. Pet. App. 42a-43a. In addition, the Commission stated that the Secretary had taken inconsistent positions in compliance instructions concerning the requirement of a test atmosphere. *Id.* at 44a n.14.

[12] The dissenting Commissioner reasoned that, regardless of whether Section 1910.134 is a "training standard or a use standard," the Secretary had established a violation. Pet. App. 51a. He maintained that, even if the standard is construed as a training provision, the 28 employees who used respirators that did not fit "were not trained to comprehend the proper fit of respirators, or to use the respirators properly." *Id.* at 52a. He also agreed that the violation was appropriately characterized as "willful." Emphasizing that 28 employees failed the banana oil test and were then exposed to



6. The Secretary petitioned for review. In December 1989, the court of appeals denied the petition and upheld the Commission's determination. The court noted that an agency's interpretation of a statute is entitled to deference and must be accepted if reasonable, and that such deference is particularly appropriate where an agency "interprets its own administrative regulations." Pet. App. 4a. The court then observed that, although the Secretary had interpreted 29 C.F.R. 1910.1029(g)(3) as a testing standard for proper fit, the Commission had interpreted it as a training standard. "The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?" Pet. App. 4a. Observing that the question is "an issue upon which the federal circuits are split" (*ibid.*), the court concluded that, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." *Id.* at 2a.[13]

Because in the court's view the statutory language did not settle the deference question, the court consulted the legislative history. It noted that Congress had decided against combining prosecutorial and adjudicative authority in the Secretary, and had created the Commission as an "autonomous, independent, and quasi-judicial body." Pet. App. 6a. The court emphasized that the "adjudicative function necessarily encompasses the power to 'declare' the

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toxic coke oven emissions above the permissible exposure limit without proper respiratory protection," he noted that the conduct "demonstrates, at the very least, plain indifference to employee safety." *Id.* at 54a.

[13] The various court of appeals decisions are cited at Pet. App. 4a-5a and Pet. 10 & n.7.

law." *Id.* at 7a. Thus, the court concluded that "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission." *Ibid.*

The court of appeals took note of *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (*Pepco*), in which this Court concluded that the interpretations of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, were not entitled to deference because the Board has only adjudicative, and not policymaking, authority. The court of appeals viewed this Court's statement as "dicta" (Pet. App. 8a) and, for two reasons, distinguishable. First, Longshore Act adjudications are nonaccusatory, "whereas OSHA requires accusatory proceedings that may result in substantial penalties." *Ibid.* Second, Longshore Act claims are brought by private citizens, and not by the government. *Ibid.* The court concluded that the Longshore Act context does not "implicate" Congress's concerns about vesting prosecutorial and adjudicative functions in a single governmental entity, and that the "need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA." *Ibid.*

The court also stated that its decision did not give "carte blanche" to the Commission; it observed that "[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." Pet. App. 9a. However, if



there is "genuine ambiguity," the court held, the reasonable interpretation of the Commission will control. *Ibid.* The court also noted that, if the Secretary maintains that a different result should prevail, she may amend or clarify the regulations through rulemaking. *Id.* at 7a, 11a.

Turning to the merits of the specific interpretive question at issue, the court ruled that the Commission did not unreasonably interpret 29 C.F.R. 1910.1029(g)(3) to be a training standard rather than a testing standard to ensure proper fit. Pet. App. 9a-11a. The court found support for that position in 29 C.F.R. 1910.134(e)(5)'s reference to "training." At the same time, the court noted that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." Pet. App. 11a. Nonetheless, applying its rule that it would defer to a reasonable Commission interpretation, the court upheld the Commission's decision.

## SUMMARY OF ARGUMENT

It is the Secretary's, and not the Commission's interpretation of an OSH Act regulation that is entitled to deference. In according deference to the Commission, the court of appeals failed to recognize that the Secretary's interpretations of her own regulations under the OSH Act are entitled to deference because she is charged with policymaking and enforcement authority; the Commission, in contrast, is purely an adjudicatory agency.

1. An agency's reasonable interpretations of ambiguous provisions of a statute it is entrusted to administer are entitled to deference because those interpretations are an integral part of the agency's authority to implement statutory policy. See *Chev-*

*ron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). Moreover, a heightened degree of deference is owed to an agency's interpretations of its own regulations precisely because the agency is the entity that promulgates and administers those regulations. *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Under these principles, it is the Secretary's interpretations that are entitled to deference. Congress designated the Secretary as rulemaker and enforcer under the Act, and it is she who implements statutory policy. Thus, the Secretary monitors workplaces across the country and makes investigative and prosecutorial decisions on a wide range of health and safety issues. As rulemaker, she exercises broad technical expertise in formulating standards; a necessary component of her rulemaking authority is the ability to issue reasonable interpretations of those standards for the guidance of employers and employees.

In contrast, the Commission is a purely adjudicatory agency with no policymaking responsibilities. It has no role in the formulation of standards. Its sole function under the Act is to adjudicate contested citations, which represent only a small proportion of the Secretary's enforcement activities. The Commission therefore does not have the broad perspective that the Secretary develops in her administration and enforcement of the Act.

2. The legislative history confirms that the Secretary is the policymaker under the Act and that her interpretations of her own regulations are therefore entitled to deference. Because Congress concluded that the Secretary would have the necessary expertise for rulemaking and that a division of authority



would hamper the Secretary's development of a cohesive enforcement program, Congress rejected bills that would have placed rulemaking in an independent board. Furthermore, the legislative history indicates that the Commission was established as an independent adjudicative body for the sole purpose of assuring due process and evenhanded treatment of employers in individual adjudications. Achievement of this purpose does not require or suggest a policymaking role for the Commission, and does not support a rule of judicial deference to the Commission, rather than the Secretary, in matters of administrative interpretation.

3. Finally, principles established in other contexts support the view that the Secretary, rather than the Commission, should receive deference. In the Longshore and Harbor Workers Compensation Act context, this Court has stated that the interpretations of the Benefits Review Board, an adjudicatory body analogous to the Commission, are not entitled to deference because that body has no policymaking authority. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). So too, under the similar statutory scheme of the Federal Mine Safety and Health Act of 1977, the Secretary, as rulemaker and enforcer, rather than the Federal Mine Safety and Health Review Commission, as adjudicator, is entitled to deference when their interpretations conflict. These principles likewise apply to the OSH Act.

## ARGUMENT

### THE SECRETARY'S INTERPRETATION OF AN OSH ACT REGULATION IS ENTITLED TO JUDICIAL DEFERENCE

In concluding that a purely adjudicatory body (the Commission) is entitled to deference rather than the policymaking and enforcement authority (the Secretary), the court of appeals misconstrued the detailed statutory scheme and incorrectly applied the principles underlying this Court's decisions on deference. By denying deference to the Secretary's views, the lower court's ruling frustrates the Secretary's exercise of the rulemaking and enforcement duties that Congress has entrusted to her.

#### A. The Secretary, As The Policymaking And Enforcement Authority Under The Act, Is Entitled To Deference; The Commission, As A Purely Adjudicatory Body, Is Not Entitled To Deference

The assignment of responsibilities under the OSH Act identifies the Secretary as the entity entitled to deference. Judicial deference is rooted in a proper respect for the "legislative delegation to an agency" of policymaking responsibility. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984).[14] An im-

[14] See also *Adams Fruit Co.* v. *Barrett*, 110 S. Ct. 1384, 1390 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Department of Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990) ("As we emphasized in *Chevron*, when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities. • • • That is a task infused with judgment and discretion, requiring the accommodation of conflicting policies that were committed to the agency's care.") (internal quotation marks omitted).



portant aspect of this respect for legislative delegation is the recognition that the entity designated by Congress to administer a statutory regime on a day-to-day basis gains expertise from its experience, and should be accorded interpretive discretion to discharge its duty.[15] Moreover, when construction of an agency's regulation, rather than of a statute, is at issue, "deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). As with deference to an agency's construction of a statute, deference to an agency's construction of a regulation is integral to the agency's policymaking and enforcement responsibilities. It rests on the fact that the interpretation has been provided by "the agency responsible for promulgating and administering the regulation" (*INS* v. *Stanisic*, 395 U.S. 62, 72 (1969))—that indeed the agency's interpretation is itself an exercise of those delegated responsibilities.[16]

[15] See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2679 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Teamsters* v. *Daniel*, 439 U.S. 551, 556 n.20 (1979) ("[D]eference is a product of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.").

[16] The settled principle is that "substantial deference" should be accorded to "an agency's construction of *its own* regulations." *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) (emphasis added). See also *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 566 (1980).

Under these principles, the Secretary, rather than the Commission, should receive deference in the interpretation of the Secretary's regulation. As this Court has observed, "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace," and "enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 6-7. In contrast, the Commission's function "is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Id.* at 7. A necessary component of Congress's grant to the Secretary of broad and exclusive authority to define, investigate, and prosecute health and safety violations, see pp. 2-3, *supra*, is the authority to provide guidance for OSHA compliance officers and for affected employers and employees by developing reasonable interpretations of the standards and regulations issued under her rulemaking authority. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 (Commission may not review Secretary's decision to issue or withdraw a citation because the Secretary's authority to make such decisions is a "necessary adjunct" of her power to set substantive standards and issue citations). According deference to the Secretary, rather than the Commission, thus "leaves interpretive discretion where it normally resides, with the policymaker rather than the adjudicator." *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) (Scalia, J.).[17]

[17] Deference is not unbounded, of course. An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. at 16-17; *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. at 1850. See also *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988) (Secretary's interpretation of own regulation should not be rejected, in the absence of a statutory or constitutional challenge, "unless [the] alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."). The court of appeals' suggestion that deference to the Commission is appropriate only when there is ambiguity in a regulation (Pet. App. 7a, 9a) does not limit the scope or significance of its decision; it is precisely when a regulation is ambiguous that the issue of deference arises, and precisely then that deference to the promulgating entity is most appropriate. See *INS* v. *Stanisic*, 395 U.S. at 72; *Udall* v. *Tallman*, 380 U.S. at 4; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 413-414. Cf. *Chevron*, 467 U.S. at 843.



Notwithstanding the Secretary's pivotal role, the court of appeals concluded that deference to the Commission was necessary to protect the Commission's adjudicatory function; the court emphasized that the Commission's authority to adjudicate encompasses a "power to 'declare' the law," and that deference to the Secretary's interpretation of her own regulations, rather than to the Commission's interpretation of them, would undermine that power. Pet. App. 6a-7a; see also *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1262. This analysis is misconceived. As an initial matter, even an agency entitled to deference on judicial review does not conclusively "'declare' the law"; only the reviewing court may properly exercise that function. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568 (noting the "ultimate judicial responsibility to determine the law"). And the court of appeals' statement is incorrect even as to the more limited point that an adjudicatory agency must receive deference in its exposition of the governing standard. The Commission's pronouncements about the mean-

ing of the Secretary's regulations are not based on the exercise by the Commission of any delegated regulatory or policymaking function; as a result, those pronouncements do not qualify for deference under *Chevron* and its governing principles. Moreover, deference to the Secretary's reasonable interpretation of her regulations—by the Commission as well as by courts—is not inconsistent with the Commission's adjudicatory function.[18] Deference to a reasonable administrative interpretation is not denigration of adjudicative authority; it is, rather, the appropriate exercise of that authority in accordance with established principles. *Chevron*, 467 U.S. at 842-845; *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568.[19]

[18] It is well recognized that deference is owed to an administrative interpretation even if the agency in question does not have adjudicatory authority over the matter in question. See, *e.g.*, *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-140 (1944).

[19] Some courts have analogized the Commission to a district court, emphasizing that the Commission, like a district court, is an adjudicatory rather than policymaking body. See, *e.g.*, *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982). See also Br. in Opp. 19 ("[T]he Commission functions in a capacity similar to a lower district court."). It is plainly not inconsistent with a district court's adjudicative function to defer to reasonable agency interpretations of its statutes or regulations. See, *e.g.*, *Whirlpool Corp.* v. *Marshall*, 445 U.S. at 8, 11, 22 (district court failed to give appropriate deference to Secretary's regulation interpreting a statute); *Udall* v. *Tallman*, 380 U.S. at 4 (district court gave appropriate deference to Secretary's interpretation). Similarly, while the Commission serves an important role as adjudicator under the Act, according deference to the Secretary does not undermine the Commission's exercise of that significant statutory responsibility.



It has been suggested that deference to the Commission is supported by the statutory requirement that the three members of the Commission be "persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission" (29 U.S.C. 661(a)). See *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1262. This suggestion also misapprehends the statute. By its terms, the purpose of the requirement of Section 661(a) is to assist the Commission in carrying out "the functions of the Commission"—namely, its "adjudicatory functions" (29 U.S.C. 651(b)(3)). The requirement does not itself expand the scope of those functions. To be sure, the requirement is designed to assure a degree of expertise in the Commissioners. Such expertise is clearly of value for members of a body whose factfinding in a complex field will be "conclusive" if supported by substantial evidence (29 U.S.C. 660(a))[20] and whose exposition of the pertinent issues will frequently be helpful to a reviewing court.[21] But the requirement does not provide a basis for giving deference to the Commission's interpretation of the Secretary's regu-

[20] See also 29 U.S.C. 659(c) (Commission's order shall be "based on findings of fact"); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 460 (upholding Commission's exercise of "administrative factfinding").

[21] See *Donovan* v. *A. Amorello & Sons*, 761 F.2d 61, 66 (1st Cir. 1985). As with review of a district court's legal conclusions, review of the Commission's legal conclusions should be undertaken with appropriate respect for the decision-maker, but with a recognition that its legal conclusions are subject to interpretive constraints, such as the deference due a policymaking entity in the interpretation of its rules.

lation, which the Commission has not promulgated and does not administer on an ongoing basis.[22]

If the Commission's interpretation, rather than the Secretary's, receives deference, the statutory structure will lead to anomalous results. For instance, the Secretary may file suit directly in district court to remedy discrimination against an employee for the assertion of his OSH Act rights. 29 U.S.C. 660(c). This litigation may involve a challenge to the Secretary's administrative interpretations, and it is clear that, in such litigation, the Secretary's administrative interpretations receive full judicial deference (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980)); if an administrative interpretation arises in a citation proceeding, however, the Commission's interpretation, rather than the Secretary's interpretation, would receive deference. The level of deference given the Secretary's interpretations should not vary according to the procedural avenues through which cases arrive in court.

Finally, deference to the Secretary's interpretation of her own regulations is supported by a number of

[22] If one governmental entity is a policymaking authority and a second governmental entity is required to defer or adhere to the policymaker's determination, the appropriate question on judicial review of the second entity's decision is the reasonableness of the policymaker's determination. See, *e.g.*, *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 778-779 (1984) (in statute requiring Federal Energy Regulatory Commission to adhere to Secretary of the Interior's determinations, question on review of FERC's decision is reasonableness of Secretary's determinations). In this context, then, the appropriate question for a reviewing court should be the reasonableness of the Secretary's interpretation; if the Commission has rejected a reasonable interpretation by the Secretary, the Commission's decision is not "in accordance with law." 5 U.S.C. 706(2)(A).



practical considerations. Because the Secretary crafted the regulation, she is in the best position to interpret its meaning. Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987) ("[T]he Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation.").[23] Additionally, the Commission, as an institution with a solely adjudicatory function, has no opportunity to develop broad expertise in administering an occupational safety and health program, or in appreciating "the likely practical outcomes" of different interpretations of particular safety and health standards. *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 66. Because it reviews only *contested* enforcement actions that the Secretary initiates—a small proportion of OSHA's overall

[23] In rejecting the Secretary's interpretation in this case, the Commission noted that the respirator standard was a pre-existing standard and adopted as a "national consensus standard," pursuant to 29 U.S.C. 655(a). Pet. App. 43a n.12. Two courts have held that the Secretary's interpretation of such a "national consensus standard" should receive reduced deference. See *Marshall* v. *Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp.* v. *OSHRC*, 573 F.2d 157, 160 (3d Cir. 1978). The selection of a pre-existing standard, however, is itself a policymaking exercise; the OSH Act empowered the Secretary to determine whether the promulgation of a pre-existing standard as a national consensus standard would "result in improved safety or health for specifically designated employees," and to determine, if pre-existing standards conflicted, "the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. 655(a). Thus, the Secretary's interpretation of the pre-existing standard which she has selected is itself entitled to deference.

activities [24]—the Commission's vision of the program is, of necessity, quite narrow.[25] The Secretary, in contrast, must exercise a much wider and sharper perspective in the course of developing new and revised standards, of monitoring workplaces across the country for compliance, and of making investigatory and prosecutorial decisions on a broad range of health and safety issues. Furthermore, a rule of deference to the Commission, rather than to the Secretary, would undermine the stability of the OSH Act regime. It would weaken the authoritative force of the Secretary's interpretations, and create incentives for challenges to the Secretary's interpretations. Such a result would hamper the policymaking and enforcement functions assigned to the Secretary by the OSH Act.

[24] In fiscal year 1988, according to Labor Department calculations, less than nine per cent of the Secretary's cited violations were contested; 174,396 violations were cited during that time. Current Report, 18 Occup. Safety and Health Rep. (BNA) 1668 (Mar. 1, 1989). (This percentage is higher than that of less than two per cent, cited in the petition (see Pet. 13 n.10), because it reflects use of contested *violations* as the numerator of the percentage; the figure in the petition reflects use of contested *cases* as the numerator, and a contested case may include more than one violation). Furthermore, most contested violations are resolved not through adjudication but through settlements or withdrawals of citations or notices of contest, as in *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 4-6 and cases cited therein.

[25] The Commission also cannot review claims that the Secretary improperly failed to issue a citation. See *Donovan* v. *OSHRC*, 713 F.2d 918, 927 (2d Cir. 1983) ("Only [the Secretary] has the authority to determine if a citation should be issued to an employer."). Therefore, its perspective is further skewed by its almost exclusive focus on charges that the Secretary's enforcement of the Act is too vigorous. Moreover, the Commission has no role outside the citation context and, as noted, does not even serve as adjudicator with respect to certain aspects of the Secretary's enforcement responsibilities. See, *e.g.*, 29 U.S.C. 660(c)(2) (authorization for Secretary to file discrimination actions in district court), 662(a) (authorization for Secretary to file motions in district courts to restrain imminent dangers). Thus, the Commission has little familiarity with these enforcement activities.



Several of these practical implications are highlighted by this case. According to the evidence in the record, as related by the Commission, respondent received explicit advance warning that respirators should be fitted in banana oil or irritant smoke, and respondent's training film included an explicit statement that a different respirator would be provided if an employee detected the presence of banana oil. Pet. App. 38a; see also Pet. App. 81a. Also according to the evidence in the record, 28 employees who detected banana oil were sent into regulated areas with the same respirators, and some were exposed to carcinogenic emissions in levels higher than the permissible exposure level. *Id.* at 38a-39a, 52a, 54a, 79a-82a. The court of appeals nevertheless rejected the Secretary's interpretation of her regulation without ever concluding that her interpretation was unreasonable. Although recognizing that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language" (*id.* at 11a), the court upheld the Commission's rejection of the Secretary's citation simply because it could not "be said that the Commission's interpretation of [the regulation] * * * was unreasonable." *Id.* at 10a. In consequence, under the court of appeals' holding, respondent in this case would escape liability despite the failure to provide different respirators to employees exposed to impermissible levels of emissions and despite the explicit prior warnings by the Secretary's compliance officer.

### B. The Legislative History Confirms That Policymaking Authority Resides With the Secretary; Therefore Deference is Owed To Her Interpretations

Since, in our view, the statutory structure plainly identifies the Secretary as the entity entitled to deference, we disagree with the conclusion of the court of appeals that resort to the legislative history is necessary. Pet. App. 6a. But in any event, that history confirms that the Secretary should receive deference in the interpretation of her regulations.

The OSH Act's legislative history reveals that Congress forged a compromise between bills creating different administrative schemes: the Administration bill, supported by business interests, proposed creation of separate rulemaking and adjudication boards, both independent of the Secretary, while the Senate and House committee bills, supported by organized labor, combined all three functions in the Secretary. See S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15, 54 (1970), and H.R. Rep. No. 1291, 91st Cong., 2d Sess. 17-20, 24 (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 148, 155, 193, 847-850, 854 (Comm. Print 1971) [hereinafter *Legislative History*].[26] Senator Javits

[26] Other bills adopted a third approach. They would have created a single independent board with both rulemaking and adjudicatory authority, while lodging enforcement authority with the Secretary. S. 2788, 91st Cong., 1st Sess. (1969), *reprinted in Legislative History* 31-72; H.R. 13373, 91st Cong., 1st Sess. (1969) *reprinted in Legislative History* 679-720. These bills died in Committee. See generally *Marshall* v. *Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1182 (3d Cir.), cert. denied, 449 U.S. 1061 (1980).



proposed in committee a compromise whereby the Secretary would regulate and enforce, and an independent three-person panel would adjudicate. S. Rep. No. 1282, *supra*, at 55, *reprinted in Legislative History* 194. Although his proposal was not accepted by the committee, Senator Javits was later successful in securing its adoption on the Senate floor. *Legislative History* 380-393, 462-479.[27] The House-passed bill, meanwhile, included provisions for both an independent standards board and an independent adjudicatory panel (*id.* at 1094-1101, 1112-1113), but the conference committee adopted the Senate version, placing rulemaking and enforcement authority with the Secretary, and creating the Commission as an independent adjudicatory agency (*id.* at 1146-1147, 1157-1169).

The court of appeals' brief discussion of the legislative history addresses only the congressional decision not to vest the Secretary with adjudicatory authority. Pet. App. 6a-7a. For purposes of the issues presented here, however, the critical point is that Congress delegated exclusive policymaking authority to the Secretary, and explicitly rejected proposals to remove that authority from the Secretary. This express choice to lodge rulemaking powers with the Secretary, rather than with the Commission or another independent board, provides powerful support for the conclusion that Congress did not intend the Commission to exercise broad policymaking responsibilities through its adjudications. See *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 65.

[27] Before the adoption of Senator Javits' amendment, Senator Dominick proposed on the Senate floor a substitute bill, which would have created a separate board for promulgating safety and health standards; the substitute was defeated. *Legislative History* 421-424, 449.

Furthermore, the reasons advanced in the legislative history for these two decisions— the retention of policymaking authority in the Secretary and the delegation of adjudicatory authority to the Commission—also support the conclusion that the Secretary is the entity entitled to interpretive deference. The decision to retain policymaking authority was supported for the very reasons this Court has stressed as bases for deference—congressional confidence in the Secretary's policymaking expertise and the congressioal goal of a close relationship between policymaking and day-to-day administration and enforcement. Noting that proponents of an independent policymaking board had argued that such a board "would represent expertise in the field of occupational safety and health," the Senate committee responded that such a board was not necessary because the "professional and technical expertise * * * involved in the development and promulgation of a standard * * * would be fully available to the Secretary, both [through] members of his staff, and [through] members of advisory committees." S. Rep. No. 1282, *supra*, at 8, *reprinted in Legislative History* 148. Similarly, in rejecting the contention that an independent board was necessary for "a separation of powers" under the Act, the Senate committee emphasized that "a sounder program will result if responsibility for the formulation of rules is assigned to the same administrator who is also responsible for their enforcement and for seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program." S. Rep. No. 1282, *supra*, at 8, *reprinted in Legislative History* 148. This decision by the Senate committee to retain policymaking authority in the Secretary ultimately prevailed on the



Senate floor and in conference, and the committee's explanation is thus entitled to considerable weight.

The legislative history also reveals that the reasons for creating the Commission were very different from the reasons for co-ordinating policymaking and administration in the Secretary. The Commission was created to ensure both fairness and the appearance of fairness in individual adjudications. The author of the compromise, Senator Javits, explained that, although due process could be achieved in adjudication by either the Secretary or an independent entity, adjudication by an independent entity "more closely accords with traditional notions of due process" (*Legislative History* 392); see also S. Rep. No. 1282, *supra*, at 55 (statement of Sen. Javits), *reprinted in Legislative History* 195, and would provide reassurance to the regulated community (*Legislative History* 393, 469).[28] At the same time, Senator Javits urged,

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[28] Senator Javits frequently referred to the Commission's power as "quasi-judicial." See, *e.g.*, S. Rep. No. 1282, *supra*, at 54 (statement of Sen. Javits), *reprinted in Legislative History* 193; *Legislative History* 464 (floor debate); *id.* at 465 (floor debate). Although Senator Javits and other legislators sometimes used the term "enforcement" in describing the Commission's adjudications (see, *e.g.*, *Legislative History* 464), they clearly were not referring to any non-adjudicatory enforcement role. Cf. *Cuyahoga Valley Ry.*, 474 U.S. at 6-7 ("[E]nforcement of the Act is the sole responsibility of the Secretary. * * * The Commission's function is to act as a neutral arbiter."). Similarly, although Senator Javits analogized the Commission to the Federal Trade Commission (*Legislative History* 462, 465), his specific example made clear that he was referring to the Occupational Safety and Health Review Commission's adjudicatory role, not to any policymaking role. See *id.* at 462 (referring to "the same type of authority that the Federal Trade Commission exercises: the power to issue a cease and desist order which, if challenged within a

his proposal would lead to a more efficient administrative process.[29] Thus, a separate adjudicative body would "preserve due process more easily, and thereby instill much more confidence in the whole program in workers and businesses alike." *Legislative History* 393 (Sen. Javits). Explanations of the conference agreement, which accepted the Javits compromise of a separate agency for adjudication but not for policymaking, similarly described the Commission's role as ensuring fairness in individual cases.[30]

Thus, the legislative history confirms that Congress did not intend the Commission to have broad interpretive powers. Like the statute itself, this legislative history indicates instead that the principal purpose of creating the Commission was to ensure fair and even-handed treatment of individual employers who

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given period of time, can be reviewed by the Circuit Court of Appeals").

[29] Senator Javits cited two reasons for his conclusion that adjudication by the Commission would be more expeditious than adjudication by the Secretary: (1) Commission orders would be enforceable before judicial review (under the committee bill, contested orders would not be enforceable until after judicial review), and (2) Commission review of ALJ decisions would be discretionary. See *Legislative History* 392; S. Rep. No. 1282, *supra*, at 55 (statement of Sen. Javits), *reprinted in Legislative History* 194.

[30] See, *e.g.*, *Legislative History* 1147 (Sen. Williams) (separation of adjudicative role intended "to provide every assurance that fairness and due process would be fully served"). Critics of the combination of all functions in the Labor Department had objected that management would perceive the Secretary, "traditionally * * * the voice of labor in the administration" (*id.* at 982 (Rep. Anderson)), as unfair to businesses that were cited for violations (*id.* at 473 (Sen. Holland)).



have been cited for violations.[31] This goal is clearly consistent with a rule requiring deference to the Secretary's interpretations of her own regulations. Congress could, of course, have achieved the same purpose of ensuring due process and fairness for individual employers by providing for challenges to citations in district courts. That Congress chose to provide the alternative of independent administrative adjudication should not change the applicable decisional principles.

### C. Principles Established In Analogous Contexts Support The View That Deference Is Owed To The Policymaking Entity (the Secretary), Rather Than the Adjudicatory Entity (the Commission)

Principles established under analogous statutory schemes also support the conclusion that the Secretary and not the Commission should receive deference. For instance, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, creates an administrative scheme similar to the OSH Act in that one entity (the Secretary of Labor) is given policymaking and program functions (33 U.S.C. 939), and another entity (the Benefits Review Board) is given adjudicatory authority (33 U.S.C. 921(b)). See *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652 n.12 (D.C. Cir. 1982) ("The role of [the Commission] closely parallels the functions of the Benefits Review Board.") In reference to the Benefits Review Board and its adjudicatory role

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[31] Senator Javits distinguished between the powers granted to the Secretary and the Commission on that very basis: "The enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberate act. There are serious penalties involved for the individual enterprise. It is a case by case proposition. It does not apply across the board to every member of industry." *Legislative History* 464.

under the LHWCA, this Court emphasized that "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co. (Pepco)* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).[32]

Despite the court of appeals' asserted distinction (Pet. App. 7a-8a), this principle is fully applicable here because Congress assigned policymaking responsibilities to the Secretary, rather than the Commission. In particular, nothing in the distinction relied on by the court of appeals—that, under the OSH Act, the Secretary has prosecutorial as well as rulemaking authority (see Pet. App. 8a; page 14, *supra*)—undercuts this basic identity. In *Pepco*, this Court based its conclusion not on the factors emphasized by the court of appeals, but on the lack of a policymaking role for the Board in the structure created by Congress—a fundamental characteristic that also holds for the Commission in the OSH Act context.[33]

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[32] Unlike the Occupational Safety and Health Review Commission, the Benefits Review Board's members are appointed by the Secretary of Labor; its decisions nevertheless constitute final agency action from which judicial review may be sought by the Secretary and other aggrieved parties. 33 U.S.C. 921(c). The Black Lung Benefits Act of 1972 (30 U.S.C. 901 *et seq.*) incorporates this structure. See 30 U.S.C. 932(a) (incorporating by reference certain administrative provisions of the Longshore Act). Under both the Longshore Act and the Black Lung Benefits Act, the Secretary has delegated her authority to the Director, Office of Workers' Compensation Programs. 20 C.F.R. 701.201, 701.202.

[33] Since *Pepco*, the weight of appellate authority in LHWCA and Black Lung benefits cases has concluded that deference should be accorded to the views of the Director, and not the Board, in cases of conflict over statutory or regulatory interpretation between the Director and the Board. See *Lukman* v. *Director, OWCP*, 896 F.2d 1248, 1250-1251 (10th Cir. 1990); *Director, OWCP* v. *Palmer Coking Coal Co.*, 867 F.2d 552, 555 & n.3 (9th Cir. 1989); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal Co.* v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Court adopts Secretary's reasonable interpretation of black lung regulation that she has promulgated, but also notes Board's agreement with Secretary); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (shared "practice" of Board and the Director is entitled to deference). But see *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 288 (6th Cir. 1988) (neither the Board nor the Director should receive deference); *Director, OWCP* v. *General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990) (neither the Board nor the Director should receive deference, at least where Director's "position has not been articulated in a more objective context through the promulgation of regulations").



In addition, the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. 801 *et seq.*, established a structure for the mine safety and health program that is similar in many respects to the OSH Act.[34] Under that statute, the Secretary of Labor is entrusted with rulemaking, investigative, and prosecutorial authority (30 U.S.C. 811, 813-816), and the Federal Mine Safety and Health Review Commission has adjudicative powers (30 U.S.C. 815, 823). Courts have concluded that, when their interpretations conflict, the Secretary, as policymaker and enforcer, rather than the Mine Safety and Health Review Commission, as adjudicator, receives deference. See *Secretary of Labor* v. *Cannelton Indus., Inc.*, 867

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[34] The Mine Act also contains certain important differences from the OSH Act. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594 (1981) (differences in statutes lead to differences in Fourth Amendment requirements).

F.2d 1432, 1433, 1435 (D.C. Cir. 1989); *Brock* v. *Peabody Coal Co.*, 822 F.2d 1134, 1145-1146 & n.41 (D.C. Cir. 1987); *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537.[35] Additionally, the legislative history of the Mine Act (which was passed seven years after the OSH Act) explicitly confirms that the Secretary should receive deference as an aspect of her policymaking and administrative responsibilities: "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977).[36]

In the OSH Act, as in these other contexts, the policymaker should receive judicial deference, particularly in the interpretation of the policymaker's regulations. Indeed, the contrary rule favoring deference to the Commision, when its interpretation conflicts with the Secretary's, treads heavily on the policymaking and regulatory role Congress sought to lodge in the Secretary. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 ("a procedure

[35] Courts have also suggested that, in the absence of a contrary interpretation by the Secretary, the Commission's interpretation receives deference (*Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 458 (D.C. Cir. 1988)), and that, if the Commission's interpretation agrees with the Secretary's, it receives heightened deference (*Clinchfield Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 776 (D.C. Cir. 1990)).

[36] See also 1 C.F.R. 305.86-4 (recommendation of Administrative Conference of the United States that legislation adopting a split-enforcement model of agency adjudication explicitly provide that the adjudicatory agency should defer to the rulemaking agency's interpretations).



[that] would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute * * * [would be] a commingling of roles that Congress did not intend"). In this case, for instance, the court of appeals' decision would permit respondent to escape liability even though the court did not find the Secretary's interpretation unreasonable. And liability would not be imposed even though (1) respondent had been explicitly warned by the Secretary's compliance officer that respirators should be fitted in banana oil (or irritant smoke), (2) respondent then informed its employees that a new respirator would be provided if they detected banana oil, and (3) respondent's employees detected banana oil, were not given different respirators, and were then exposed to levels of carcinogenic coke oven emissions exceeding the permissible exposure level. Because reasonable interpretations of a regulation are an integral part of policymaking and enforcement, and because Congress entrusted to the Secretary policymaking and enforcement responsibilities, the Secretary, and not the Commission, should receive deference in the interpretation of the Secretary's own regulations.[37]

[37] Although the court of appeals stated that it was "certainly possible to reach an alternate interpretation of the ambiguous regulatory language" (Pet. App. 11a), it did not explicitly address the reasonableness of the Secretary's interpretation. As a result, this Court may wish to remand the case to the court of appeals for consideration of that issue. See, *e.g.*, *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 397 (1989); *Seatrain Shipbuilding Co.* v. *Shell Oil Co.*, 444 U.S. 572, 597 (1980).

In our view, the Secretary's interpretation of her regulation should be sustained because it is not "plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, 380 U.S. at 17. In support of the reasonableness of the Secretary's interpretation, we note that the Commission's principal basis

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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for rejecting that interpretation (Pet. App. 40a, 41a-42a)—the specific fit requirement in another provision (29 C.F.R. 1910.1029(g)(4)(i))—is misconceived. Nothing prevents overlapping prohibitions in statutes or regulations. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979); Pet. App. 52a (dissenting opinion). Moreover, the Commission's cramped interpretation of 29 C.F.R. 1910.134, if accepted, would necessarily govern not only when the regulation applies in the coke oven emissions context, but also when 29 C.F.R. 1910.134 applies of its own force (cf. note 5, *supra*), and when it applies to regulations that incorporate it and do not have specific fit requirements (*e.g.*, 29 C.F.R. 1910.1017(g)(3)).

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